82-5319

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

RICHARD W. SIMON,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court erred in denying the petitioner's motion for a change of venue and motion for a continuance.

II. Whether the trial court erred in denying the petitioner's motion for individual voir dire.

III. Whether the trial court erred in failing to excuse jurors for cause.

IV. Whether the trial court erred in denying the petitioner's motion for a mistrial following discovery of a note in the jury room.

V. Whether the trial court erred in excusing jurors for cause based upon their inability to consider the death penalty.

VI. Whether Tenn. Code Ann. § 39-2404(h) is unconstitutional in prohibiting the jury from being informed as to the consequence of their failure to reach a unanimous verdict as to punishment.

VII. Whether the trial court erred in prohibiting defense counsel from conferring with each other in the exercise of peremptory challenges.

VIII. Whether the trial court erred in refusing to admit proof showing that the death penalty is not a deterrent.

IX. Whether the closing argument of the District Attorney General deprived the petitioner of his due process right to a fair trial.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-5088

RICHARD W. SIMON,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF TENNESSEE

The respondent respectfully submits that the petition for writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

On June 26, 1980, the trial court denied the petitioner's motion for a new trial. The judgment of the trial court was affirmed by the Supreme Court of Tennessee on June 1, 1982. That opinion is officially reported at 635 S.W.2d 498.

The petitioner filed a petition to rehear with the Supreme Court of Tennessee on June 10, 1982. The petitioner's petition to rehear was summarily denied on June 28, 1982.

JURISDICTION

The petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257(3). However, the repondent submits that this case does not present a substantial federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

The Eight Amendment, United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, United States Constitution:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Tenn. Code Ann. § 39-2402:

> (a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or attempt to perpetrate, any . . . robbery . . . is murder in the first degree.
>
> (b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

Tenn. Code Ann. § 39-2402:

> (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as a part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt . . .
>
> (c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances. . .; and any evidence tending to establish or rebut any mitigating factors. . .

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. . .

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of one or more of the statutory aggravating circumstances, which shall be limited to the following. . .:

(7) the murder was committed while the defendant was engaged in committing. . . any. . . robbery. . .

(h) If the jury can not ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) the defendant has no significant history of prior criminal activities;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) the victim was a participant in the defendnat's conduct or consented to the act;

(4) the murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) the defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) the defendant acted under extreme duress or under the substantial domination of another person;

(7) the use or advanced age of the defendant at the time of the crime;

(8) the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

STATEMENT OF THE CASE

On May 22, 1979, the Montgomery County Grand Jury indicted the petitioner, along with co-defendants Malcolm Gray, Larry Simpson, and Thomas Mickens for the first degree murder of Karen Sue Burkhart. The trial of Thomas Mickens was subsequently severed and on April 2, 1980, the jury returned a verdict of guilty of first degree murder as to the petitioner, Malcolm Gray, and Larry Simpson. On April 3, 1980, the jury returned a verdict of death by electrocution as to the petitioner and life imprisonment as to Malcolm Gray and Larry Simpson.

On May 2, 1980 and June 26, 1980, the petitioner filed a motion for a new trial and an amendment thereto, respectively. The trial court denied the petitioner's amended motion for a new trial on June 26, 1980. The petitioner filed a notice of appeal on July 16, 1980. On June 1, 1982, the Tennessee Supreme Court affirmed the petitioner's verdict as to guilt and punishment. The Tennessee Supreme Court denied the petitioner's petition to rehear on June 28, 1982. On August 26, 1982, the petitioner filed a motion for stay of execution pending the disposition of this petition; said motion was granted by the Honorable Chief Justice William J. Harbison on August 26, 1982.

The petitioner timely filed the instant petition for writ of certiorari with this Honorable Court.

STATEMENT OF THE FACTS

In its opinion affirming the jury's verdict and punishment, the Tennessee Supreme Court aptly summarized the proof adduced at trial as follows:

> The crime occurred on the evening of Sunday, April 22, 1979, at about 11:30 p.m. Appellant and five other young men, two of them juveniles, had been riding around Clarksville and its vicinity

since the early part of the evening. They had planned to rob another establishment but when they went to it no one responded. Then they decided to rob the mobile home of Mr. and Mrs. Paul Burkhart, which served as their residence and also as an office for a trailer park which they operated. One of the juveniles in the group was a student in a high school attended by the daughter of Mr. and Mrs. Paul Burkhart, and the daughter had told him that the Burkharts kept a large amount of cash in their mobile home.

The group went to the premises of the trailer park in two automobiles. The driver of one vehicle and a companion waited outside during the commission of the robbery. Appellant was riding in the other automobile driven by Malcolm Gray. They were accompanied by Larry Simpson and a juvenile named Everett Ogburn. Ogburn did not get out of the vehicle, but the other three went to the door of the Burkhart trailer and knocked. When Mr. Burkhart answered, they forced their way into the living room and demanded money. Appellant was armed with a .38 caliber pistol and Gray with a shotgun. Gray and Simpson wore stocking masks, but appellant was not masked.

Mr. Burkhart told the intruders where a money box was kept in the den. Appellant and his companions went into the den, and at that point Mrs. Burkhart came down the hall of the trailer to the doorway of the den. Appellant grabbed her around the waist, wrestled her to the floor and put his gun to her neck. He then shot her through the neck, severing the jugular vein. She bled to death within a short time thereafter. Without attempting to assist her, appellant and his companions seized the money box and fled. The helpless bleeding victim attempted to use the telephone, but was unable to do so. Her husband and children called for help and attempted to staunch the flow of blood without success. The victim at no time offered any resistance to appellant, was unarmed, and weighed only about 110 pounds. The shooting was unprovoked, and no excuse has been offered for it, except that in a signed statement appellant indicated that the shooting was accidental and that he did not intend to harm the victim. Appellant did not take stand in his defense at any stage of the lengthy trial.

Appellant and his companions divided the money, threw away the weapons they were carrying and made every effort to conceal their participation in the crime. Appellant left Clarksville the next day and flew to Chicago where he was apprehended by the police several days later. He gave the police a statemkent strongly incriminating himself and admitting his participation in the robbery, although denying any intention to injure or kill the victim.

Mr. Burkhart identified appellant without hesitation. The vehicle in which appellant and his companions had arrived at the trailer was identified by the son and daughter of the deceased and by a witness who lived in a trailer across the street from the Burkhart home. The juvenile who had accompanied appellant and his companions, Everett Ogburn,

> testified at the trial and described the events of the evening. Thomas Mickens, who had driven the other vehicle and who was being held in jail on a murder charge in connection with this case, confirmed Ogburn's account of the activities of the evening and of the events prior to and after the robbery. The weapons used in the robbery were recovered. A firearms expert testified that the pistol used by appellant was not equipped with a hair trigger and that normal pressure was required to pull the trigger in order to fire it. Redacted statements from Gray and Simpson corroborated generally the testimony given by the other witnesses and the events summarized above although in their redacted form did not directly identify appellant as the person who fired the pistol.

State v. Simon, 635 S.W.2d at 501-02.

HOW THE QUESTIONS WERE RAISED BELOW

The petitioner preserved his complaints concerning the trial court's denial of his motion for a change of venue and motion for a continuance at trial and on appeal.

The petitioner preserved his complaint concerning the trial court's denial of his motion for individual voir dire at trial and on appeal.

The petitioner preserved his complaint concerning the trial court's refusal to excuse jurors for cause at trial and on appeal.

The petitioner preserved his complaint concerning the trial court's denial of his motion for a mistrial at trial and on appeal.

The petitioner preserved his complaint concerning the trial court's excusal of jurors for cause based upon their inability to consider the death penalty at trial and on appeal.

The petitioner preserved his complaint concerning the constitutionality of Tenn. Code Ann. § 39-2404(h) at trial and on appeal.

The petitioner preserved his complaint concerning the trial court's refusal to permit defense counsel to confer in exercising their peremptory challenges at trial and on appeal.

The petitioner raised the complaint that the trial court erred in excluding proof that the death penalty does not operate as a deterrent at trial and on appeal. However, the petitioner failed to assert this complaint in conjunction with the District Attorney General's closing argument as trial or in the Tennessee Supreme Court.

The petitioner preserved his complaint concerning the argument of the District Attorney General in referring to the petitioner and his co-defendants as "a pack of wolves" at trial and on appeal. However, the petitioner failed to contemporaneously object to the District Attorney General's reference to himself as "the people's representative" and the District Attorney General's reference to the jury as the conscience of the community. The petitioner raised these complaints of alleged prosecutorial misconduct in his motion for a new trial and in the Tennessee Supreme Court.

REASONS FOR DENYING THE WRIT

The respondent insists that the Supreme Court of Tennessee correctly affirmed the trial court's judgment approving the jury's verdict finding the petitioner guilty of first degree murder and fixing his punishment at death by electrocution. The Supreme Court of Tennessee did not decide a federal question of substance not heretofore determined by this Court or decide such a question in a way not in accord with the applicable decisions of this Court, another state court of last resort, or a federal court of appeals. See Supreme Court Rule 19(1)(a). There being no special and important reasons for a grant of certiorari in this case, the Court in its sound judicial discretion should deny the writ sought here.

I. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERD AND CORRECLTY REJECTED THE PETITIONER'S COMPLAINT THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR A CHANGE OF VENUE AND MOTION FOR A CONTINUANCE.

The petitioner contends that due to the nature and extent of the pre-trial publicity in this case, he was deprived of his right to a fair trial by the trial court's refusal to grant a change of venue or a continuance. In examining this complaint, the Supreme Court of Tennessee found that although there was considerable pre-trial publicity at the time of the crime and shortly before the trial, the record did not support the petitioner's contention that the publicity so tainted the jury venire as to preclude a fair trial in the county where the crime was committed. Since the pre-trial publicity was not inflammatory or unfair, and since much of the publicity which took place shortly before the trial was favorable to the petitioner, the Supreme Court of Tennessee found that the trial court did not abuse its discretion in denying the petitioner's motion for a change of venue and motion for a continuance. The respondent submits that this conclusion is warranted by the record and, therefore, the instant issue does not raise a substantial federal question.

II. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S FACTUAL AND LEGAL CONTENTION THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS.

The petitioner insists that the trial court erred in denying his motion for individual voir dire of prospective jurors, thus depriving him of his right to a fair trial.

The record reveals that after the first two days of the voir dire examination, the trial court permitted individual voir dire concerning pre-trial publicity.

As noted by the Supreme Court of Tennessee, the trial court had wide discretion in the method used to voir dire prospective jurors where the venire has been exposed to potentially prejudicial information. In the instant case, the voir dire not only consumed six days of trial, but counsel was permitted to extensively examine the jurors on a variety of matters. Under these circumstances, the record supports the Supreme Court of Tennessee's finding that the trial court did not abuse its discretion in denying the petitioner's motion for individual voir dire. Accordingly, the issue under review does not present a substantial federal question.

III. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECLTY REJECTED THE PETITIONER'S FACTUAL AND LEGAL CONTENTION THAT THE TRIAL COURT ERRED IN REFUSING TO EXCUSE PROSPECTIVE JURORS WHO HAD BEEN EXPOSED TO PRE-TRIAL PUBLICITY.

The petitioner contends that the trial court erred in refusing to exclude prospective jurors for cause who had been exposed to pre-trial publicity, thereby depriving the petitioner of his right to a fair trial.

However, in examining the record, the Supreme Court of Tennessee found no merit to the petitioner's contention that the trial court abused its discretion in determining the qualifications of the jurors. Rather, the jurors under attack adequately demonstrated to the trial court that they could sit as impartial jurors. In addition, prospective juror I. J. Harper, the juror upon whom the petitioner concentrates his attack, stated that although he had been exposed to publicity concerning the case, he could be impartial. This juror was ultimately removed from the panel by the use of a peremptory challenge and thus did not participate in the trial.

Based upon the record presently before the Court, the respondent submits that the Supreme Court of Tennessee correctly rejected the petitioner's complaint. Accordingly, the petitioner's right to a fair trial was not violated and the present question does not constitute a substantial federal question.

IV. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S FACTUAL AND LEGAL CONTENTION THAT THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR A MISTRIAL FOLLOWING THE DISCOVERY OF A NOTE IN THE JURY ROOM.

The petitioner contends that he was entitled to a mistrial upon the discovery of a note which was found in the jury room during the sentencing phase of the trial. The note read as follows:

> The Burkheart [sic] case is over. The boy's got life. We were trying to give them death. KKK

With the petitioner making no request for individual voir dire on the matter, the trial court instructed the jurors that they were to completely disregard the note and ascertained that the note would not affect their decision as to the proper punishment for the petitioner and his co-defendants.

Based upon the foregoing recitation of the events surrounding the discovery of the note in question, the respondent submits that the Supreme Court of Tennessee correctly found that the trial court acted properly in the examination of the jurors and that the trial court did not abuse its discretion it denying the petitioner's motion for a mistrial. The instant issue does not raise a substantial federal question and, thus, the issue does not warrant the granting of certiorari.

V. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S FACTUAL AND LEGAL CONTENTION THAT THE TRIAL COURT ERRED IN EXCUSING FOR CAUSE THOSE PROSPECTIVE JURORS WHO COULD NOT CONSIDER THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE.

In reliance upon Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the petitioner contends that the trial court erred in improperly disqualifying prospective jurors who could not consider the imposition of the death penalty in this case. In a related complaint, the petitioner contends that the trial court erred in refusing to permit him to rehabilitate those prospective jurors who expressed an inability to follow the law on capital punishment.

In considering the instant complaint, the Supreme Court of Tennessee found that the trial judge excused only those prospective jurors who stated unequivocally that they could not consider the imposition of the death penalty under any circumstances. Since the action of the trial court was proper under Witherspoon v. Illinois, supra, the petitioner's contention does not raise a substantial federal question.

The respondent additionally asserts that the trial court did not abuse its discretion in prohibiting defense counsel from rehabilitating jurors who had expressed an inability to follow the law regarding capital punishment. Under Tennessee law, the practice of rehabilitating jurors who should be excused for cause is not permitted. Rule 24(b), Tennessee Rules of Criminal Procedure. The petitioner has therefore not presented an issue warranting the granting of certiorari.

VI. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECLTY REJECTED THE PETITIONER'S LEGAL CONTENTION THAT TENN. CODE ANN. § 39-2404(h) IS UNCONSTITUTIONAL.

The petitioner contends that Tenn. Code Ann. § 39-2404(h) unconstitutionally prohibits the jury from being informed as to the consequence of its failure to reach a unanimous verdict as to punishment.

The respondent submits that the statute in question does not deprive the jury of any necessary sentencing information and, in fact Tenn. Code Ann. § 39-2404(h) actually removes the possibility that the jury will speculate as to the resulting effects of their decision. See State v. Johnson, 632 S.W.2d 542 (Tenn. 1982); State v. Harrington, 627 S,W,2d 738 (Tenn. 1981); State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981); State v. Strouth, 620 S.W.2d 467 (Tenn. 1981); Houston v. State, 593 S.W.2d 267 (Tenn. 1979). Moreover, this Court has previously found that the instant issue does not warrant the granting of certiorari and the same finding should be made in the instant case. See Harrington v. Tennessee, cert. denied June 7, 1982; Strouth v. Tennessee, cert. denied 102 S.Ct. 1491; Houston v. Tennessee, cert. denied 101 S.Ct. 251.

VII. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S CONTENTION THAT THE TRIAL COURT'S ERROR IN REFUSING TO PERMIT DEFENSE COUNSEL TO CONFER IN THE EXERCISE OF PEREMPTORY CHALLENGES WARRANTED A NEW TRIAL.

The petitioner urges that the Supreme Court of Tennessee erred in finding that the trial court's refusal to permit defense counsel to confer in the exercise of peremptory challanges did not warrant a reversal of the conviction. However, the respondent submits that the

instant complaint does not involve the violation of a federally protected constitutional right.

The petitioner does not possess a constitutional right to peremptory challenges. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Rather, the right to exercise peremptory challenges is granted by state law. Since the violation of a state statute or rule of practice does not, by itself, constitute the deprivation of a right guaranteed by the United States Constitution, Combs v. Tennessee, 530 F.2d 695 (6th Cir. 1976), the repondent submits that the present issue under review does not state a claim cognizable on certiorari.

VIII. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECLTY REJECTED THE PETITIONER'S LEGAL CONTENTION THAT THE TRIAL COURT ERRED IN REFUSING TO ADMIT PROOF THAT THE DEATH PENALTY WAS NOT A DETERRENT.

At trial and on appeal to the Supreme Court of Tennessee, the petitioner contended that the trial court erred in refusing to admit proof that the death penalty was not a deterrent. In his petition for the writ of certiorari, the petitioner asserts at the first instance that such proof should have been admitted in view of the District Attorney General's argument concerning the appropriate punishment under the facts of the case.

The respondent submits that the Supreme Court of Tennessee correctly found that the trial court properly excluded the proof proffered by the petitioner. In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), this Court stressed the crucial importance of an informed decision-making body charged with determining whether a sentence of life or death should be imposed in a capital case and opined that, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."

(emphasis supplied), 428 U.S. at 276, 96 S.Ct. at 2958; See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 1859 (1976); Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). As the Tennessee Supreme Court recognized in Houston v. State, 593 S.W.2d 267 (Tenn. 1980), Tenn. Code Ann. § 39-2404(c), which statute governs the admissability of evidence at the punishment stage, is significantly broader than the federal requirements of due process in that the statute permits the admission into evidence of "any matter that the court deems relevant to the punishment."

In the context of the instant case, the respondent insists that the trial court properly rejected the petitioner's tendered evidence. Whether the death penalty is a deterrent to homicide has no relevancy to this particular petitioner and does not bear upon any of the mitigating circumstances set forth in Tenn. Code Ann. § 39-2404(j). Thus, admission of the petitioner's proof would not have assisted the jury in determining the appropriate punishment for the petitioner's acts. Accordingly, the present issue does not present a substantial federal question.

XI. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S LEGAL CONTENTION THAT THE DISTRICT ATTORNEY GENERAL'S ARGUMENT DEPRIVED HIM OF HIS RIGHT TO A FAIR TRIAL.

The petitioner contends that his right to a fair trial was denied by the District Attorney General's argument to the jury wherein the District Attorney General referred to himself as the people's representative; referred to the jury as the conscience of the community; and referred to the petitioner and his co-defendants as "a pack of wolves."

An examination of the record reveals that upon the petitioner's objection to the District Attorney General's reference to "a pack of wolves," the trial court sustained the objection and admonished the District Attorney General not to refer to the defendants in such a manner. Given this, the petitioner could not possibly have been prejudiced by the remark.

The respondent additionally asserts that the other contested comments were within the bounds of proper advocacy. Accordingly, the present issue does not raise a substantial federal question.

CONCLUSION

For the reasons stated herein, the respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AFFIDAVIT OF CERTIFICATE OF SERVICE

STATE OF TENNESSEE)
) ss
COUNTY OF DAVIDSON)

I, ROBERT A. GRUNOW, being first duly sworn, make oath that I am a member of the Bar of the Supreme Court of the United States. I have previously entered my appearance as counsel of record on behalf of the respondent in this cause, the State of Tennessee.

I further certify that on this 27th day of September, 1982, I deposited ten copies of the instant Brief in Opposition to Petition for Writ of Certiorari in a United States Mailbox, with first-class postage prepaid, properly addressed to the Clerk of this Court and within the time allowed for filing and that I deposited one copy of the instant Brief in Opposition for Writ of Certiorari in a United States Mailbox with first-class postage prepaid, properly addressed to the Honorable Henry A. Martin, P. O. Box 3190, Nashville, Tennessee 37219 and within the time allowed for service.

I further certify that all parties required to be served have been served.

ROBERT A. GRUNOW
Deputy Attorney General

Sworn to and subscribed before me this 27th day of September, 1982.

Deborah P. Hampton
NOTARY PUBLIC

My Commission Expires: July 21, 1985